Editor's Note: appeal filed, Case No. 1:02CV01868 D. D.C. (Sept. 23, 2002), rev'd (Dec. 23, 2002), 237 F.Supp. 2d 48, appealed filed No. 03-5056 (D.C. Cir.) Voluntary withdrawl (Apl. 11, 2003); VACATED to the extent inconsistent with Southern Utah Wilderness Alliance v. Norton, 273 F.Supp. 2d 48 (D.D.C. 2002) by Order dated October 15, 2003.

SOUTHERN UTAH WILDERNESS ALLIANCE
NATURAL RESOURCES DEFENSE COUNCIL
WILDERNESS SOCIETY
UTAH CHAPTER OF THE SIERRA CLUB

IBLA 2002-177 Decided August 22, 2002

Appeal of a Decision Record/Finding of No Significant Impact, issued by the Moab Field Office, Bureau of Land Management, approving the Yellow Cat Swath 2D Seismic Project, on the basis of Environmental Assessment UT-062-02-13. MFO-02-G01.

Affirmed.

1. Administrative Procedure: Adjudication--
Administrative Procedure: Administrative Review--Board of Land Appeals--Supervisory Authority of the Secretary--Secretary of the Interior

The Board of Land Appeals has authority to review information submitted on appeal to demonstrate the sufficiency of BLM's NEPA analysis and to permit that information to "cure," if necessary, an otherwise perceived deficiency in that analysis, since, when the Board ultimately acts in deciding an appeal, its decision becomes the "agency" decision for the purposes of any court review. However, such exercise of our de novo review authority is discretionary with the Board and it should be used with caution and not to mask any substantial defect which may have occurred in the NEPA analysis.

2. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact

In determining whether a proposed action will generate significant impacts requiring the preparation of an EIS, the law is clear that the significance of an impact is related not only to its intensity, but also to its context. Thus, an impact which could be significant in isolation may be

insignificant when compared to other impacts in the area of the proposed action, although the cumulative harm that may result from its contribution to existing impacts must also be a consideration.

3. Environmental Quality: Environmental Statements-- National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact

In examining the environmental impacts of a proposed action, BLM must consider alternatives that accomplish the intended purpose of the proposed action, are technically and economically feasible, and have a lesser impact than the proposed project. A "rule of reason" approach applies to both the range of alternatives and the extent to which each alternative must be addressed.

APPEARANCES: Stephen H.M. Bloch, Esq., Liz Thomas, Esq., Joro Walker, Esq., Salt Lake City, Utah, Mike Chiropolos, Esq., Boulder, Colorado, for appellants; Scott W. Hardt, Esq., Denver, Colorado, for intervenors; James E. Karkut, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

The Southern Utah Wilderness Alliance, Natural Resources Defense Council, Wilderness Society, and the Utah Chapter of the Sierra Club (collectively, SUWA) have appealed from a Decision Record and Finding of No Significant Impact (DR/FONSI), issued by the Moab Field Office Manager, Bureau of Land Management (BLM), on January 31, 2002, approving a Notice of Intent to Conduct Oil and Gas Exploration Operations (NOI), on Federal lands in Grand County, Utah, northeast of Moab. WesternGeco had filed the NOI seeking approval for the Yellow Cat Swath 2D Project Geophysical Project (Yellow Cat Project or Project). The Field Office Manager concluded on the basis of the environmental assessment (EA) prepared for the Project (EA UT-062-02-13) that the proposed exploration activities, with mitigation measures, would not have a significant impact on the human environment and conformed to the approved Resource Management Plan (RMP) for the Grand Resource Area. 1/

With its notice of appeal, SUWA filed a petition for a stay of the Project. On February 22, 2002, the Board granted an interim stay of the Project. On the same day, BLM filed a request with the Director, Office of

1/ BLM states in its answer at page 12 that "BLM staff and a consultant performed the environmental analysis and prepared the draft EA." The identity of the consultant is not disclosed in the record.

Hearings and Appeals (OHA), pursuant to 43 CFR 4.5(b), seeking his review of the Board's interim order. By order dated February 23, 2002, the Director granted that request, vacated the interim stay, entered a stay pending consideration of the merits of the appeal, and remanded the matter to the Board. By order dated March 21, 2002, the Director dictated that the Board expedite consideration of the appeal and render a decision no later than August 31, 2002.

On August 24, 2001, WesternGeco filed its NOI with BLM seeking approval for the Yellow Cat Project, a 2-dimensional (2D) swath vibroseis geophysical project to take place in secs. 13, 24, 25, 35, and 36, T. 22 S., R. 22 E., secs. 17-23 and 25-30, T. 22 S., R. 23 E., secs. 1-3 and 9-13, T. 23 S., R. 22 E., and secs. 1-12, 14-21, and 27, T. 23 S., R. 23 E., Salt Lake Meridian, Grand County, Utah.

The Project area is located northeast of Moab, Utah, and covers approximately 23,040 acres or 36 square miles of private, state, and public lands. WesternGeco proposed the Project on behalf of Eclipse Exploration (Eclipse), who holds Federal and state oil and gas leases covering the entire Project area. (Intervenors' Answer, Ex. 2, Declaration of George E. Handley, President of Eclipse, ¶ 2.) The EA states that the proposed action had been determined to be consistent with the terms and conditions of the RMP, which designated land in the Project area as Category 1 land, meaning that it is open to oil and gas leasing with standard stipulations. The EA also states that "[t]he bulk of the proposed action would occur in areas with an open designation for off-road vehicle use. A small portion of the proposed Project area would lie within an area designated L1, with off-road vehicle use restricted to existing roads and trails." (EA at 3.)

The purpose of the Project is to acquire and evaluate data for potential exploratory drilling for oil and gas. 2/ The Project would consist of seven lines, about one mile apart, with each line 6.1 miles in length. All seven lines would be used for recording data, but vibroseis buggies would only travel on three source lines (lines two, four, and six). All vehicular travel during the Project would be restricted to those three lines. No vehicles would be allowed on the other lines (lines one, three, five, and seven).

Seismic detectors (geophones) would be deployed along all seven lines and connected to receiver cables coupled in turn to recording instruments to collect data. Seismic energy would be generated by vibroseis techniques using the vibroseis buggies. Each 6.1 mile source line would have 147 source points.

The Project would have three phases: survey, recording, and reclamation. During the survey phase, a five or six member crew would use the global positioning system to place flag locations at source and

_____

2/ The Project was partially completed at the time it was stayed. For convenience, we reference the Project as if it were proposed for the future.

receiver points. The crew would determine access to receiver and source points. Survey work would be accomplished on foot or with vehicles using existing roads. In the recording phase, trucks would transport recording equipment to a staging area and a helicopter would deliver the equipment to designated locations along the receiver lines. Crews would walk the receiver lines and lay the cable by hand. At each designated location, geophones would be placed in a predetermined pattern using foot pressure to insert them in the soil. After deployment of equipment, four vibroseis buggies, each approximately 10 feet wide and 20 feet in length, would drive along each of the three source lines. They would proceed in single file in a slightly weaving pattern to reduce line-of-sight disturbance. At each source point, the buggies would lower a base plate, located under the center of each vehicle, to the ground and vibrate the plate for a designated time. Following completion of the vibroseis/recording process over a single line, the recording operation would be moved to the next line. Buggies would drive a total of 18.3 miles on the source lines with approximately 16.7 miles of those lines being on public lands. In addition, the buggies would travel approximately 4 miles of additional cross-country access routes.

Reclamation would be concurrent with the recording process in that the recording crews would remove all flags, equipment, and trash as they passed through the area. Further reclamation would be finished within 30 days of completion of the recording phase. Survey and recording would take approximately 14 days.

In describing the potential impacts from the vibroseis buggies, the EA assumed a travel corridor width of 12 feet. (EA at 5, 7.) The EA stated that the 18.3 total miles comprising the three source lines, plus an additional four miles of cross-country access routes, and two acres of staging area, calculated to a total surface disturbance area of approximately 35 acres of private, state, and public land, assuming that 100% of the cross-county travel route would be impacted. Id. at 7. The actual area disturbed would be less than 35 acres, the EA explained, because impacts would be limited to the tire tracks of the vibroseis buggies and the areas where the vibrator pads are lowered. Id.

On December 11, 2001, BLM issued a news release informing the public of a 30-day comment period on the draft EA. It subsequently extended that deadline through January 22, 2002. On December 20, 2001, BLM received a memorandum regarding informal consultation under section 7 of the Endangered Species Act, from the Field Supervisor, Fish and Wildlife Service (FWS), Ecological Services, West Valley City, Utah, stating that FWS "concurs with [BLM's] December 13, 2001, 'no effect' determination" for threatened and endangered (T&E) species and critical habitat. On the document is a handwritten note stating that, pursuant to a telephone conversation between BLM and FWS on December 20, 2001, FWS changed its conclusion to "may affect, but does not adversely affect" T&E species. The EA addresses the Mexican spotted owl, the ferruginous hawk, and the black-footed ferret as endangered or threatened species. It is not clear whether the "may affect" determination relates to one or all of these species.

In response to comments received, BLM revised the EA where it deemed appropriate and produced a 14-page synopsis of comments and responses. 3/ That synopsis identified and responded to 35 points distilled from the comments received. On January 31, 2002, the Moab Field Office Manager issued her DR/FONSI approving the project subject to "the attached Terms and Conditions (Form 3150-4a) and the [16] Special Conditions developed in this environmental assessment." (DR/FONSI at 1.) Thereafter, SUWA appealed and requested that the Project be stayed.

On February 15, 2002, following its survey work, WesternGeco began the recording phase of the Project, collecting the seismic data generated by the vibroseis buggies. (BLM's Request for Director's Review, Feb. 22, 2002, at 1.) As stated supra, as a result of the interim stay issued by the Board and the stay issued by the Director, OHA, activity on the Project ceased on February 22, 2002. Subsequently, WesternGeco and Eclipse requested to intervene in this proceeding. The Board granted the request and established a briefing schedule by two orders dated March 22 and 27, 2002. The intervenors state that approximately one half of the Project was completed along one and a half of the three source lines, before the Project was stayed on February 22. (Intervenors' Answer at 8.)

On February 25, 2002, the Board received a supplemental filing in support of the petition for stay, which consisted of a copy of an article by Terry Tempest Williams, published in The New York Times OP-ED, on February 21, 2002, titled "Chewing Up the Fragile Land;" the Declaration of Liz Thomas, attorney for SUWA, regarding field observations of ongoing seismic activities through and including February 22, 2002; and two exhibits, Exhibit 1, a copy of a February 5, 2002, letter from SUWA to BLM and an attached photograph, and Exhibit 2, a copy of a February 14, 2002, letter from SUWA to BLM and an attached photograph. Thomas asserts that she sent the February 14, 2002, letter to the Moab Field Office requesting BLM to suspend operations because of wet soil conditions on the Project area, which was covered with patchy snow. (Thomas Declaration, ¶ 6.) Thomas recounts her observation of "huge tire chains that have claw-like parts welded to the chains" mounted on the tires of three of the four vibroseis buggies and the results of their use. (Thomas Declaration, ¶¶ 15-16; Ex. 2.) In the February 14, 2002, letter, Thomas argues that use

---

3/ Among the commenters were the Superintendent, Arches National Park, National Park Service, U.S. Department of the Interior (NPS), who submitted a Jan. 11, 2002, memorandum; the Utah Field Supervisor, Ecological Services, FWS, Salt Lake City, Utah, who filed a Jan. 17, 2002, memorandum; Dr. Jayne Belnap, Canyonlands Field Station Leader, U.S. Geological Survey (USGS), Biological Resources Division, Forest and Rangeland Ecosystem Science Center, Moab, Utah, who signed a Jan. 17, 2002, letter; the Acting Director, National Environmental Protection Act (NEPA) Program, Ecosystems Protection and Remediation, U.S. Environmental Protection Agency, Region 8, Denver, Colorado, who filed a Jan. 24, 2002, letter; and the Interim Director, State of Utah, Department of Natural Resources, Division of Wildlife Resources (UDNR), who offered comments in a Jan. 22, 2002, letter.

of tire chains was not mentioned or addressed in the EA. (Ex. 2.) Thomas further alleges that, upon visiting the Project site on February 22, 2002, she observed ruts left by the buggies, which were in some places over 12 inches deep. (Thomas Declaration, ¶¶ 8, 10-11.) She states that, judging by the tracks along the source lines, the buggies attempted to avoid wet areas or steep slopes and in so doing did not maintain a single-file line, thereby creating separate tracks and multiplying the adverse impacts. Id., ¶ 11.

On March 15, 2002, intervenors submitted their answer. They appended affidavits from managers of both companies. (Intervenors' Answer, Exs. 1, 3.) Further, they attached a study prepared, inter alia, by Dr. Belnap, entitled "Biological Soil Crusts: Ecology and Management," Technical Reference 1730-2 (2001). (Intervenors' Answer, Ex. 4.)

On March 25, 2002, Thomas submitted a Second Supplemental Declaration with two appended photographs. The first photograph shows a vibroseis buggie with chains on its tires. The second shows a ruler, which Thomas asserts to be 15 inches in length, placed upright in a track allegedly left in the Yellow Cat area by one of the vibroseis buggies.

On April 18, 2002, BLM submitted its Answer and exhibits, as well as the record of the DR/FONSI. A separate filing was made on that same date, consisting of nine record documents from the Moab Field Office, which included, inter alia, the Grand RMP, and Supplemental Oil and Gas EA (1988). On April 29, 2002, SUWA submitted a Reply to the two answers. In June, SUWA filed a Notice of Supplemental Exhibit, attaching SUWA's Exhibit F, a draft environmental assessment entitled "North Mail Trail 3D Seismic Survey Environmental Assessment (CO-SJFO-01-081EA), prepared for a WesternGeco vibroseis project to take place in Colorado (the "North Mail Trail EA"). The intervenors and BLM responded to this exhibit on July 1 and 2, 2002, respectively. Pursuant to the Board's request, BLM submitted SUWA's Dome Plateau wilderness unit proposal on June 27, 2002.

SUWA asserts that BLM's EA does not support the DR/FONSI and, therefore, BLM has violated NEPA, 42 U.S.C. §§ 4321-4370b (1994). SUWA contends that BLM failed to consider a reasonable range of alternatives, failed to take a "hard look" at the environmental effects of the Project, and erred in concluding that there would not be significant impacts from the Project. In SUWA's opinion, BLM must prepare an environmental impact statement (EIS).

BLM and the intervenors argue that a reasonable range of alternatives was considered, even though only two were analyzed in extended detail. Other alternatives were raised and rejected, according to BLM, because they provide significantly inferior geophysical data and, thus, would not meet the need and purpose for the Project and would have the same level or a greater level of environmental impact. BLM contends that it took a "hard look" at impacts of the Project and properly concluded that they would be insignificant. BLM asserts that SUWA has failed to provide objective evidence that BLM's conclusion is erroneous.

In preparing an EA, which assesses whether an EIS is required under section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (1994), an agency is required to take a "hard look" at the problems addressed, identifying relevant areas of environmental concern, and make a convincing case that the environmental impact is insignificant. Maryland-National Capitol Park & Planning Commission v. U.S. Postal Service, 487 F.2d 1029 (D.C. Cir. 1973); Yuma Audubon Society, 91 IBLA 309, 312 (1986). As a general rule, the Board will affirm a FONSI with respect to a proposed action if the record establishes that a careful review of environmental problems has been made, all relevant environmental concerns have been identified, and the final determination is reasonable. Owen Severance, 118 IBLA 381, 392 (1991); G. Jon Roush, 112 IBLA 293 (1990); Utah Wilderness Association, 80 IBLA 64, 78, 91 I.D. 165, 173-74 (1984). The record must establish that the FONSI was based on reasoned decisionmaking. Thus, one challenging such a finding must demonstrate either an error of law or fact or that the analysis failed to consider a substantial environmental problem of material significance to the proposed action. G. Jon Roush, supra at 298; Glacier-Two Medicine Alliance, 88 IBLA 133, 141 (1985). The ultimate burden of proof is on the challenging party and such burden must be satisfied by objective proof. Mere differences of opinion provide no basis for reversal. Red Thunder, Inc., 117 IBLA 167, 175, 97 I.D. 263, 267 (1990); G. Jon Roush, supra at 297-98.

[1] In this case, all parties have supplemented the record with affidavits, studies, and related filings. SUWA contends generally that its submissions are to be taken as evidence in support of its challenge to the EA, but that the Board's review of BLM's decision is limited to the record before BLM at the time of BLM's decision. SUWA is incorrect.

In National Wildlife Federation, 145 IBLA 348, 361-62 (1998), we addressed an argument similar to that advanced herein that BLM's submission of supplemental information to the Board amounts to "post hoc rationalization:"

> Under the arbitrary, capricious, or an abuse of discretion standard, the courts are limited in their review to the administrative record created before the agency. However, when a timely appeal subjects a BLM decision to this Board's jurisdiction, our review authority is de novo in scope because it is our delegated responsibility to decide for the Department "as fully and finally as might the Secretary" appeals regarding use and disposition of the public lands and their resources. 43 C.F.R. § 4.1; see Ideal Basic Industries v. Morton, 542 F.2d 1364, 1367-68 (9th Cir. 1976); Forest Oil Corp., 141 IBLA 295, 306 (1997); Richard Bargen, 117 IBLA 239, 245 n.3 (1991); United States Fish & Wildlife Service, 72 IBLA 218, 220 (1983). Thus, the Board may exercise its de novo review authority to determine whether the record in a case supports the action taken by BLM * * *.

145 IBLA at 362. The Board in that case cited In re Lick Gulch, 72 IBLA 261, 273 n.6, 90 I.D. 189, 196 n.6 (1983):

> The Board, in essence, makes the determination for the Secretary of the Interior. As his direct delegate, the Board, no less than the Secretary, himself, is required to consider all relevant information tendered both by an appellant and by BLM. Just as an appellant can submit studies to support its prior assertions, so, too, can the Bureau submit data to support its contentions. The time frame in which the data is generated is irrelevant to appeals such as the instant one, since, until the Board acts, there is no decision for the Department.

See also Melluzzo Stone Company, 154 IBLA 23, 26 (2000); Riddle Ranches v. BLM (On Judicial Remand), 152 IBLA 119, 121-24 (2000).

Thus, the Board has authority beyond that of the Federal courts to review information submitted on appeal to demonstrate the sufficiency of BLM's NEPA analysis and to permit that information to "cure," if necessary, an otherwise perceived deficiency in that analysis, since, when the Board ultimately acts in deciding an appeal, its decision becomes the "agency" decision for the purposes of any court review.

However, such exercise of our de novo review authority is discretionary with the Board and it should be used with caution and not to mask any substantial defect which may have occurred in the NEPA analysis. In Vulcan Power Co., 143 IBLA 10, 23-24 (1998), the Board noted that, while supplementary documentation in support of a decision may be considered on appeal, it is

> not necessarily equivalent to a contemporaneous record. See Save Our Cumberland Mountains, Inc., 108 IBLA 70, 85-86, 96 [I.D.] 139, 147-48 (1989). An affidavit prepared to respond to specific issues and arguments raised by an adverse party is not a substitute for a complete and contemporaneous record of the facts, analyses, policies, and reasoning upon which the agency relied in the decisionmaking process. Without such a record, it is impossible to answer the broader question of whether there was a rational basis for the Decision at the time it was made.

Even de novo Board review may not be able to cure deficiencies so profound as to undermine the validity of the environmental analysis. If the record regarding an EA, even as supplemented, makes it impossible for the public, or the Board, to fairly determine that the agency sufficiently considered impacts and reasonably found them not to be significant to the quality of the human environment, then the mandate of NEPA has not been fulfilled.

The information submitted by BLM on appeal in this case addressed issues raised by SUWA on appeal and, at times, fleshed out matters discussed in the EA or in BLM's responses to the comments. Our review of the record in this case leads to the conclusion that BLM did comply with

NEPA's dictates and properly issued a FONSI with respect to the proposed action.

[2] In determining whether a proposed action will generate significant impacts requiring the preparation of an EIS, the law is clear that the significance of an impact is related not only to its intensity, but also to its context. See 40 CFR 1508.27(a) ("Significance varies with the setting of the proposed action"). In Hanley v. Kleindienst, 471 F.2d 823, 831 (2d Cir. 1972), the court stated: "Where conduct conforms to existing uses, its adverse consequences will usually be less significant than when it represents a radical change." Thus, an impact which could be significant in isolation may be insignificant when compared to other impacts in the area of the proposed action, although the cumulative harm that may result from its contribution to existing impacts must also be a consideration.

Of particular importance to our conclusion in this case is the nature of the proposed Project area. The record shows that there are no designated wilderness areas, Wilderness Study Areas, or lands identified by BLM as having wilderness qualities within the Project area. 4/ The Project area is open to oil and gas leasing and previous geophysical and oil and gas exploration has taken place in the Project area "leaving approximately 40 miles of old, previously bulldozed travelways constructed for seismic work." (Answer, Ex. A, Declaration of Rich McClure, BLM Natural Resource Specalist and Project Leader (McClure Declaration), ¶ 3.) According to McClure, the linear paths from dozing are "still noticeable throughout the Project area." Id.

The Project area is within the Thompson Mining Area. Over 950 mining claims have been located within that area. Heavy equipment (bulldozers and backhoes) were used in past mineral exploration to construct roads and

_____

4/ On Jan. 22, 2002, the last day of the comment period for the draft EA in this case, SUWA submitted a wilderness proposal for the Dome Plateau Wilderness Unit, pursuant to the BLM Manual Handbook at H-6310-1.06E. According to this proposal, which was prepared by the Utah Wilderness Coalition (UWC), of which SUWA is a member, BLM had favorably considered a small portion of the proposed unit during the Lost Spring Canyon wilderness inventory in 1999, but the latest inventory for the remainder of the area had taken place in 1979. (Jan. 22, 2002, SUWA proposal letter at 2-3; Dome Plateau unit proposal at 2-3.) The proposed unit coincided with 381 acres of the Project area in the Project's most northwest portion. Line 7 of the Project, which is not a source line, is within the proposed Dome Plateau unit. On Jan. 31, 2002, the Field Office Manager signed an "Evaluation of New Information Suggesting That an Area of Public Lands Has Wilderness Characteristics," with respect only to the portion of the Project which overlapped with the proposed Dome Plateau unit. The Field Office Manager found that UWC's proposal did not sufficiently identify information that was not already known by BLM when it previously conducted wilderness reviews and concluded that there was no basis for changing the outcome of those prior reviews.

excavate pits for sampling minerals. Many of the mining claims have been abandoned but mineral exploration continues in the area with claimants sometimes traveling cross-country by vehicle. (McClure Declaration, ¶ 4.)

Livestock grazing occurs on three allotments covering all the lands in the Project area. "The Project area also includes range improvements consisting of two water wells, 13 stock ponds, and 10 gap fences varying in length from 100 feet to a little under 1 mile. All the range improvements are accessed by existing trails and roads." (McClure Declaration, ¶ 5.)

Portions of four Grand County Class B roads, totaling about 11 linear miles, cross the Project area. These roads receive annual maintenance, including blading, when necessary. The Project area also contains approximately 79 miles of Class D roads. All Class B and D roads are claimed as Revised Statute 2477 rights-of-way by the county. Approximately 80 percent of the Project area is open to cross-country off-road vehicle (ORV) use. For that reason, BLM has not tried to close roads and trails to such use in that part of the Project area. Approximately eight miles of the Dome Plateau Jeep Safari Trail are within the Project area. That trail is used by several thousand ORV users each year during the Jeep Safari. ORV use from motorcycles and all-terrain type vehicles occurs in the southern portions of the Project area. A four-mile portion of the developed and heavily-used Kokopelli mountain-bike trail winds through a portion of the Project area. (McClure Declaration, ¶¶ 2-3.)

SUWA asserts that BLM's analysis of the potential impacts of the Project is woefully inadequate. We disagree. In Bales Ranch, 151 IBLA 353, 358 (2000), we stated:

> When considering whether BLM has taken a hard look at the environmental consequences that would result from a proposed action, this Board will be guided by the "rule of reason," as expressed in Don't Ruin Our Park v. Stone, 802 F. Supp. 1239, 1247-48 (M.D. Pa. 1992):
>
> > An EA need not discuss the merits and drawbacks of the proposal in exhaustive detail. By nature, it is intended to be an overview of environmental concerns, not an exhaustive study of all environmental issues which the project raises. If it were, there would be no distinction between it and an EIS. Because it is a preliminary study done to determine whether more in-depth study analysis is required, an EA is necessarily based on "incomplete and uncertain information." Blue Ocean Preservation Society v. Watkins, 767 F. Supp. 1518, 1526 (D. Hawaii 1991) * * *. So long as an EA contains a "'reasonably thorough discussion of . . .

> significant aspects of the probable environmental consequences,'" NEPA requirements have been satisfied. Sierra Club v. United States Department of Transportation, 664 F. Supp. 1324, 1338 (N.D. Ca. 1987) * * * quoting Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974). [Footnote deleted.]

See 40 C.F.R. § 1508.9; Scientists' Institute for Public Information v. Atomic Energy Commission, 481 F.2d 1079, 1092 (D.C. Cir. 1973); Missouri Coalition for the Environment, 124 IBLA 211, 219-20 (1992).

Thus, in determining whether the proposed Project would cause significant impacts in the Project area, we will be guided by a "rule of reason."

SUWA's principal concern regarding impacts relates to soils and cryptobiotic soil crusts. In the EA, BLM identified the soil types in the Project area. The EA stated that approximately 80 percent of the soils in the Project area are very deep, well-drained rocky or sandy loams and 20 percent are poorly drained clay soils. (EA at 8.) The clay soils are found primarily at the northeastern ends of the three source lines and represent approximately 4.8 miles of those lines. The EA also recognized the existence in the Project area of cryptobiotic crusts, which are composed of cyanobacteria, lichens, mosses, green algae, microfungi, and other bacteria, and which are in various stages of development in the Project area. Id. BLM stated that recovery times for impacts to soil crusts could vary "from several days (physical crust formation) to years (set back in development stage). Some research on biological soil crusts indicates that impacts to the organisms could last 50-300 years." Id. BLM estimated the total acreage of soils to be impacted by the Project to be 35 acres in the 23,040-acre Project area. (EA at 8.)

According to BLM, prior to 1980, geophysical operations were conducted using bulldozers for line construction, which removed vegetation and other surface features, often in a line of sight. "During the 1980's, bull dozing was reduced and efforts toward surface restoration increased. Geophysical operations of the last 10 years have not left the visual impacts of earlier projects." (EA at 23.) BLM cited the possibility of increased ORV use in the Project area, noting that ORV use would prolong recovery of soils and vegetation on portions of the source lines, but that ORV use was not prohibited on much of the Project area, with ORV use being limited to existing roads and trails only in the northern portions of the Project area. The EA concluded that "[g]iven past, present, and future use, the proposed geophysical activity would not appreciably add to the expected disturbance from oil and gas drilling, grazing, and recreation." Id.

In approving the Project, the Moab Field Office Manager imposed various special conditions, several of which related to lessening impacts to soils. She required that vehicle use be confined to the source lines and use a zig-zag pattern to avoid straight line-of-sight disturbances, and that no vehicles of any kind be allowed on the four receiver lines.

(Special Condition 9.) She provided for the suspension of operations when ground conditions were wet enough to cause rutting, granting the authorized officer the authority to make such a determination. (Special Condition 13.) She required that BLM reclamation signs ("Restoration Area - Please Suspend Travel") be posted on both sides of existing roads crossed by the vibroseis buggies. (Special Condition 14.) She also required rehabilitation measures, when necessary, including scarification of vehicle tracks visible from existing roadways, scarification of compacted soils, reseeding, rehabilitation of existing trails used for access during operations, and construction of waterbars on slopes. (Special Condition 15.)

In assigning error, SUWA points to comments provided by other Federal agencies and UDWR as evidence that BLM failed to properly address significant impacts. 5/ SUWA places particular reliance on the comment letter of Dr. Belnap relating to soils submitted with respect to the draft EA. However, while there is no question that Dr. Belnap has vast experience in studying soil crusts, in a declaration filed by BLM with its answer as Exhibit D, Dr. Belnap explained her purpose in providing the comments on which SUWA now relies.

In this statement, Dr. Belnap notes that her intention "was to point out text in the draft EA that needed clarification and make BLM aware of the most up-to-date information on the disturbance and recovery of biological soil crusts. The purpose of the comments was not to opine on whether or not Project impacts would be significant as that term is used in the National Environmental Policy Act process." (Answer, Ex. D at 2, ¶ 2.) Based on her experience and review of the data generated from the Moab area, she opined that "disturbance of the cryptobiotic crusts caused by the Project would visually recover in 10 years" and that biological recovery could range from "seven years for early successional stage sites subjected to mere crushing to centuries for late successional sites subjected to crust removal or complete burial." (Answer, Ex. D at 2, ¶ 4.) In her opinion, disturbance to cryptobiotic crusts would be limited to areas actually subjected to vehicle or foot traffic, as opposed to adjacent areas. Id.

_____

5/ In its Jan. 11, 2002, memorandum, NPS noted that the Project might be visible and audible from areas of Arches National Park, but it "anticipate[d] no direct effects on the resources" of the park from the Project. It requested to be kept informed of future exploratory and production drilling that might result from the Project because of its potential impact on the park. FWS's Jan. 17, 2002, memorandum made specific recommendations for improving the EA to add consideration of several species identified on the Utah Natural Heritage database for sensitive animal species, including the kit fox, corn snake and southwestern toad. FWS also recommended consideration of four plant species and clarification of a mathematical error in the consideration of impacts to cryptobiotic crusts. UDNR, in its Jan. 22, 2002, letter expressed concern regarding wildlife impacts from newly created ORV trails. In each case, BLM addressed the agency comments

Moreover, in response to Comment 19, which is set forth on page 8 of the Comment Responses, that the EA failed to analyze potential impacts to biological soil crusts; that soil erosion would continue for over 3 years and wind erosion would continue for more than 10 years; that blowing sediment would bury adjacent plants and soils; that surface disturbance would disrupt recovery of soil flora, surface integrity, and nitrogen inputs for 50-300 years; and that additional disturbances to the soils would postpone the recovery times, BLM responded:

> Biological soil crusts are addressed in the EA. BLM does not refute the time frames or research referenced in the comments or in Technical Reference 1730-2, and the text of the EA was revised.
>
> As described in the EA, the project area is not a pristine area. The biological soil crusts within the project area are in various stages of development. In order for the biological soil crusts to fully recover, many of the existing uses would have to be excluded. At the present time livestock grazing, geophysical exploration, oil and gas drilling, road construction, dispersed recreational activities, and other surface disturbances are likely to continue on these public lands, as allowed under the 1985 Grand Resource Management Plan.

(Comment Responses at 8.)

The revised text of the EA reads at page 10:

> The effects on biological soil crusts from the proposed action include loss of a physical crust, soil compaction, decrease in nitrogen fixation ability, set back in development stage and burial by blowing sands. These impacts can allow annual weed growth to increase, along with an increase in potential for wind and water erosion. These are impacts with recovery times varying from several days (physical crust formation) to years (set back in development stage). Some of the research on biological soil crusts indicate that impacts to the organisms could last 50-300 years.

---

fn. 5 (continued)
in its response and/or added special conditions to approval of the Project. EPA's Jan. 24, 2002, letter relied on the comments from the other agencies, asserting that the matters raised therein should be addressed. It also complained that the draft EA did not mention the proximity of the Project to Arches National Park, which it claimed violated NEPA's mandate for public participation. It asserted that the EA should be reoffered for comment for that reason. However, as noted above, NPS did not anticipate any direct impacts to the park from approval of the Project itself. See Comment Responses at 3-7; Special Conditions (Pages 1-3) attached to the DR/FONSI.

The fact that cryptobiotic crusts disturbed by the Project may take many years, even centuries, to recover biologically does not, in and of itself, equate to a significant impact when viewed from the perspective that the Project area contains cryptobiotic crusts in various successional stages and, therefore, recovery rates will necessarily differ. In addition, it is recognized that late successional stages are less tolerant of disturbance than a low-successional stage and that "frequent disturbance can maintain the biological crust at a low-successional stage (e.g. dominated by cyanobacteria * * *)." (Technical Reference 1730-2 (2001) at 45.) We agree with BLM's assessment that

> although a disturbed crust may play a more complete or positive ecological role when it is fully recovered from disturbance, it would be erroneous to conclude that the same crust plays no role until the point of full recovery. As a result, gauging "significance" solely according to the time necessary for full biological recovery does not fall within the "rule of reason."

(Answer at 36.)

Moreover, we do not find significance in the fact that on several occasions in its response to comments on the draft EA BLM observes that visual impacts from the Project should be "substantially unnoticeable" in 3 to 5 years (Comment Responses at 13), while Dr. Belnap estimates 10 years for visual recovery of cryptobiotic crusts. 6/ First, one could argue that there is no inconsistency between those statements because a determination of the visual recovery of cryptobiotic crusts may require a rather close examination of the soil surface and, thus, not be ascertainable in an ocular reconnaissance of a large expanse of land over which vibroseis buggies had passed 3 to 5 years earlier and whose tracks were substantially unnoticeable due to weathering and/or vegetative growth. Second, even assuming 10 years for visual recovery in general, that extended timeframe does not establish any error in BLM's analysis. In fact, given the

_____

6/ Admittedly, after referencing Dr. Belnap's estimate of the time for visual recovery of cryptobiotic crusts, BLM states at page 34 of its answer that "BLM's experience with on-the-ground observations of the effects of other geophysical exploration in the area is consistent with that view." In support of that statement, however, BLM cites McClure's Declaration in which he states at paragraph 13 that "BLM's experience in observing the on-the-ground effects of other geophysical exploration projects in the vicinity of Grand County has been that areas over which vibroseis trucks or truck-mounted drills have driven visually recover in a few years." (Answer, Ex. 4 at 2.) Thus, while Dr. Belnap's estimate is limited to cryptobiotic crusts, McClure's statement of "a few years" is more consistent with BLM's statements in its Comment Responses of "3 to 5 years" for visual recovery in general.

multiple use nature of the Project area, we believe it quite possible that some visual impacts of the Project may be observable even beyond 10 years. Such a fact, however, would not raise such impacts to a level of significance in the Project area. The impacts of the Project would not, as BLM concluded in its EA, appreciably add to the expected disturbance from other authorized activities in the Project area. 7/

Accordingly, in light of the existing authorized uses in the Project area, it is reasonable to conclude that the impacts on soils in the Project area is not of significance when gauged against past, present, and future activities in the area. 8/

SUWA asserts that BLM failed to consider "new information" SUWA presented in its Dome Plateau wilderness unit proposal, which it contends is relevant to consideration of the Project. (Statement of Reasons (SOR) at 12-16.) SUWA argues that the Grand RMP is outdated, and that its conclusions regarding visual resources management (VRM) classes should be updated and improved because the RMP no longer reflects "current visual resource values." Id. at 14. SUWA believes that if these classifications were updated, the Dome Plateau area would be identified as VRM category II, which would require retention of the existing character of the landscape. Id. at 15, citing BLM Manual H-8410-1 at 6.

BLM was not required to re-evaluate the VRM determinations of its RMP in analyzing the Project. In Southern Utah Wilderness Alliance, 122 IBLA 165 (1992), the Board addressed the argument that approval of a geophysical exploration project violated the multiple use mandate of the Federal Land Policy and Management Act (FLPMA) because it failed to consider alternative uses of the subject land:

_____

7/ The efficacy of BLM's NEPA analysis is not undercut by SUWA's allegations that WesternGeco and BLM failed to adhere to the terms and conditions of approval. Such allegations are beyond the scope of the present appeal, which is limited to whether or not BLM complied with the dictates of NEPA in issuance of a FONSI and approval of the Project. However, BLM should be aware that evidence of failure to comply with terms and conditions of approval of a geophysical exploration project could substantially undermine BLM's credibility regarding future approvals.

8/ In its reply, SUWA offers the declaration of Steve Boyle, owner of and Senior Biologist for BIO-Logic Environmental, a natural resources consulting company, who stated his opinions, inter alia, about the impact of the Project on soils in the Project area. (Reply, Ex. B.) While his opinions support the conclusion that there will be numerous impacts to soils and vegetation, BLM has made the determination through its resource planning process that impacts to soils from multiple uses in the Project area are acceptable. Under such circumstances, we do not find that his opinions regarding soil impacts dictate a different result in this case.

> Multiple use is generally considered in the context of BLM's land-use planning. See 43 U.S.C. § 1712(a) and (c) (1988). In fact, alternate uses of the land were considered when adopting the Resource Management Plan (RMP) in June 1985. They need not be considered anew each time BLM decides to lease the land or grant leave to undertake an activity.
>
> To the extent that appellants challenge the RMP because BLM failed to consider certain alternative uses of the land (e.g., designation as wilderness or an ACEC), their challenge must fail. Appellants can only object to the manner in which the RMP has been implemented, and they have not established that the seismic survey violates the RMP. See Albert Yparraguirre, 105 IBLA 245, 248 (1988). BLM considered the impact of the proposed action on all of the resources appellants seek to protect, and the fact that appellants would prefer other exclusionary uses of the land does not establish error. See Oregon Shores Conservation Coalition, 83 IBLA 1, 8 (1984); Preserve Our Scenic Environment, 47 IBLA 276, 279 (1980); California Association of Four-Wheel Drive Clubs v. Andrus, No. 79-1797-N (S.D. Cal. Aug. 5, 1980). [Footnote omitted.]

122 IBLA at 171-72.

To the extent SUWA seeks designation of Dome Plateau as wilderness, it does so, in part, on the basis that old bulldozed seismic lines, which involved the scraping away of surface soil crusts, are now virtually unnoticable. (Dome Plateau Proposal at 10.) Such a position is inconsistent with SUWA's position in this case that approval of the Project "will thus cause significant and lasting scars that will impair the integrity of these lands for literally hundreds of years." (SOR at 1.)

To the extent SUWA has alleged that BLM failed to take a "hard look" at other impacts of the Project, such as air quality and sensitive animal and plant species, its arguments have been considered and rejected because they do not establish that BLM erred in approving the Project on the basis of a FONSI. In addition, BLM considered the cumulative impacts of the Project, concluding that it "would not appreciably add to the expected disturbance." (EA at 22-23.) Such a conclusion is supported by the record.

[3] We now turn to SUWA's contention that BLM failed to consider a reasonable range of alternatives. Section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E) (1994), requires, in addition to the preparation of an EIS, that every Federal agency "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which

involves unresolved conflicts concerning alternative uses of available resources." The requirement that appropriate alternatives be studied has been held to apply to the preparation of an EA, even if no EIS is found to be required. Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-29 (9th Cir. 1988), cert. denied, 489 U.S. 1066 (1989); Powder River Basin Resource Council, 120 IBLA 47, 55 (1991); State of Wyoming Game and Fish Commission, 91 IBLA 364, 369 (1986). Thus, an EA must include a brief discussion of alternatives to the proposed action. See 40 CFR 1508.9(b); Southern Utah Wilderness Alliance, 140 IBLA 341, 348 (1997).

A purpose behind the obligation of an agency to consider alternatives to the proposed action is to "[u]se the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects * * *." 40 CFR 1500.2(e). An agency must consider alternatives that accomplish the intended purpose of the proposed action, are technically and economically feasible, and have a lesser impact than the proposed project. Bales Ranch, 151 IBLA at 363, citing, inter alia, Headwaters, Inc. v. BLM, 914 F.2d 1174, 1180-81 (9th Cir. 1990). This Board has stated that a "rule of reason" approach applies to both the range of alternatives and the extent to which each alternative must be addressed. Southern Utah Wilderness Alliance, 152 IBLA 216, 223-24 (2000). BLM considered a reasonable range of alternatives in this case.

The EA describes the "need and purpose for the proposed action," as follows:

> The proposed action is needed to acquire and evaluate data for potential exploratory drilling for oil and gas reserves in Grand County, Utah. The objective * * * is to locate untapped oil and gas sources with potential for development. Geophysical exploration using swath 2D techniques is capable of locating and displaying subsurface pools or pockets that potentially contain oil and gas reserves.

(EA at 2.) SUWA does not dispute that statement. It argues that BLM failed to consider the shothole method of geophysical exploration or vibroseis on existing roads and trails.

The record is replete with evidence that those alternatives would not meet the intended purpose of the propose action and/or have a greater impact than the proposed action. Each is considered in the section of the EA, at pages 6-7, titled "Alternatives Considered But Not Analyzed in Detail."

Regarding the shothole technique, the EA explains that the shothole method and vibroseis involve a similar procedure for layout of receiver lines and stations, the difference being in the activity on the source lines. With vibroseis, the vibrator pads on the vibroseis buggies create the energy waves for obtaining data. The shothole method, however, typically involves the use of drill-mounted trucks, which drive along the source lines and drill shotholes at designated intervals. In this case, "147 holes per line would be drilled along the three source lines." (EA at

6.) Shotholes would be drilled approximately 100 feet deep and loaded with 10 to 20 pounds of explosives. Prior to detonation, the holes would be backfilled with drill cuttings and a non-metallic plug. Excess drill cuttings would be mixed with soil and spread around the surrounding area. The anticipated impacts from cross-country travel by shot-hole truck or vibroseis vehicle were considered by BLM in the EA to be comparable. (EA at 6.)

It is quite clear that the shothole method would have comparable, if not greater, impacts than vibroseis because of the impacts of the drilling activity. See McClure Declaration, ¶ 11; Handley Declaration, ¶ 6. BLM reasonably decided not to consider in detail the alternative of employing the drill-mounted truck shothole method. 9/ SUWA has offered no more than a contrary opinion in support of its position. Moreover, there is evidence in the record that shothole technology would not have met the purpose and needs of the proposed action. (Nov. 29, 2001, letter from Handley to BLM; see EA at 7.)

The alternative of utilizing vibroseis vehicles only on existing roads and trails was briefly mentioned in the EA at 7, but not considered in detail because "[a]lthough there were numerous roads and trails in the project area, there were not enough to provide a network of source points for vibroseis for a linear 2D project. If all vehicles were confined to existing roads and trails, there would not be adequate source points to provide coverage of the target area and the technical needs of the project would not be met." SUWA challenged BLM's conclusion as an "unsupported and unsupportable assumption." (SOR at 9.)

In response, intervenors offered Handley's Declaration, in which he stated at paragraph 7:

> If BLM had included a requirement that "only existing roads and trails" could be used for the Yellow Cat Program, the result would be that the data gathered would be drastically degraded in quality. The object of this exploration program is to precisely identify the sub-surface stratigraphy from 9,000' to 15,000' below the surface. Recording data along existing trails may have been adequate for defining the sub-surface structure, but not the stratigraphy. The specific stratigraphy I am trying to identify [is] the four carbonate zones within the Pennsylvanian section (Ismay, Desert Creek, Akah & Barker Creek). The seismic character of these zones can be very subtle. Very precise and accurate data is needed to define their location, size,

---

9/ The EA also mentioned the use of drills transported by helicopter to employ the shothole method, explaining that such a variation was very expensive and typically used only in areas not accessible by surface vehicles. It was reasonable not to consider such an alternative in detail in this case because the Project area was easily accessible by surface vehicles.

> thickness, depth, and reservoir potential. In order to record the resolution needed to define stratigraphy, a 2D line must be laid out as straight as possible. A 2-D Swath project such as this one requires extreme precision in the laying-out of lines, and in general the source points cannot be offset from those lines, or the data will be distorted, because the offsetting causes a loss of resolution. As a result, unless the existing trails and roads conform exactly to the lines in the swath program--which they do not in this case—the data collected will not delineate the potential reservoirs with the precision needed to accomplish Eclipse's objectives.

This statement clearly explains why existing roads and trails could not be utilized to accomplish the need and purposes for the Yellow Cat Project.

SUWA has provided the Board with a copy of the North Mail Trail EA, prepared by BLM's San Juan Public Lands Center for a 3D geophysical exploration project proposed by WesternGeco within the boundaries of the Canyon of the Ancients National Monument. SUWA's position is that the North Mail Trail EA contains a more extensive examination of alternatives, including analysis of the shothole method and use of vibroseis only on existing roads and trails, and, thus, shows the inadequacy of the EA in this case.

The Yellow Cat Project is on public lands without any special status (as well as on state and private lands). The North Mail Trail Project is within the boundaries of a National Monument. The Yellow Cat Project proposes a 2D swath method, while the North Mail Trail Project involves 3D. In 2D seismic testing, data is collected along linear cross-sections, while in 3D testing, data is collected along a grid over a wider surface area in which source points are perpendicular to the receiver lines. The Yellow Cat Project will impact approximately 35 acres over approximately 36 square miles. The North Mail Trail Project will impact approximately 243 acres in approximately 19.9 square miles. (North Mail Trail EA at 6-7.) Given the location of the North Mail Trail Project and the greater area over which impacts will be expected because of 3D testing, a wider range of alternatives appears reasonable for that project. It does not follow, however, that the smaller number of alternatives considered for the Yellow Cat Project was, therefore, unreasonable. We find no deficiencies in BLM's analysis of alternatives for the Yellow Cat Project.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

_____
Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

_____
Gail M. Frazier
Administrative Judge

ADMINISTRATIVE JUDGE HEMMER DISSENTING:

I agree with the majority that the Board may and should sustain a BLM FONSI on the basis of post-FONSI supplementation of data that supports NEPA analysis in an EA and FONSI conclusion. We part company, however, in two respects. First, I have a different view of the Board's obligation to ensure that the procedures of NEPA have been met. Second, I diverge from the majority in deciding whether the Board can find that BLM's supplemental documentation sustains a FONSI when it shows that impacts were not fully addressed during the NEPA process. The post-decisional data submitted by BLM raises questions regarding what the record might have shown and the participants might have concluded if the impacts indicated in that data had been timely identified during the NEPA process. Vulcan Power Co., 143 IBLA 10 (1998). I believe that the post-FONSI supplementation of information regarding impacts makes it "impossible to answer the broader question of whether there was a rational basis for the decision at the time it was made," 143 IBLA at 23-34, and "masks [a] substantial defect" in the NEPA process, against which the majority cautions. (Majority Opinion, supra at 157.)

Whether BLM followed the procedure required by section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (1994), requires a brief discussion of the procedural requirements of the statute, and the requirements of an EA/FONSI. NEPA's procedures are designed to "insure a fully informed and well-considered decision." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978). NEPA does not require agencies to elevate environmental concerns over other appropriate considerations. Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97 (1983). Rather, NEPA only requires that an agency take a "hard look" at the environmental effects of any major Federal action. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976). NEPA assures that decision-makers are fully apprised of the likely effects of alternative courses of action so that their selections represent informed decisions. In re Bryant Eagle Timber Sale, 133 IBLA 25, 29 (1995). As the Court stated in Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989), "NEPA does not mandate particular results, but simply prescribes the necessary process."

An EA may be employed to "provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact." 40 CFR 1508.9(a)(1). It must include "brief discussions of * * * environmental impacts of the proposed action and alternatives." 40 CFR 1508.9(b). If an EA process demonstrates that significant impacts will occur from a proposed action, and the agency wishes to move forward with that action rather than with an alternative which mitigates the impacts, see 40 CFR 1508.20 (mitigation), then it must prepare an EIS. 40 CFR 1508.9(a)(3). If the EA process leads to the conclusion that no significant impacts will occur from the proposed action or from that same action with mitigation, then the agency prepares a FONSI. 40 CFR 1508.13.

Review of an EA and FONSI requires the Board to ensure that the conclusion with respect to a lack of significant impacts is justified. The Board will affirm an approval of a proposed action based on a FONSI "if the record establishes that a careful review of environmental problems has been made, all relevant areas of environmental concern have been identified, and the final determination that no significant impacts will occur is reasonable in light of the environmental analysis." Southern Utah Wilderness Alliance, 122 IBLA 334, 338 (1992), citing Southern Utah Wilderness Alliance, 122 IBLA 6, 12 (1991); G. Jon & Katherine M. Roush, 112 IBLA 293, 297 (1990); Hoosier Environmental Council, 109 IBLA 160, 172-73 (1989); Glacier-Two Medicine Alliance, 88 IBLA 133, 141 (1985); Utah Wilderness Association, 80 IBLA 64, 78, 91 I.D. 165, 174 (1984). The record must demonstrate that BLM has "made a convincing case that no significant impact will result therefrom, or that such impact will be reduced to insignificance by the adoption of appropriate mitigation measures." Robert W. Hall, 149 IBLA 130, 138 (1999), citing Nez Perce Tribal Executive Committee, 120 IBLA 34, 37-38 (1991). An appellant challenging a FONSI

> must demonstrate either an error of law or fact or that the analysis failed to consider a substantial environmental problem of material significance to the proposed action. * * * The ultimate burden of proof is on the challenging party and such burden must be satisfied by objective proof. Mere differences of opinion provide no basis for reversal.

Rocky Mountain Trails Association, 156 IBLA 64, 71 (2001), citing Larry Thompson, 151 IBLA 208, 217 (1999).

My analysis derives from the following facts. The record indicates that each of the four vibroseis buggies has "64,000 pound peak force" such that, because of ground vibration impacts on cultural resources, WesternGeco proposed an increased buffer of 143 feet away from any such resource. (Nov. 30, 2001, Letter from Matheson Mining Consultants, Inc., on behalf of WesternGeco, at 1-2, and attachment thereto entitled "Summary of Western U.S. Vibroseis Ground Motion Attenuation Studies.") The EA acknowledges that vibroseis buggies may run over woody vegetation "leaving patches of dead shrubs" and crushing small trees, and that the "tracks left by the vehicle tires would be visible for an estimated 1-3 years." (EA at 9.) According to the EA, the impact from the vehicles would be "a relatively short-term (1-5 year) reduction of vegetative cover." (EA at 12.) The EA states only that visual impacts "will last for more than one year." (EA at 15.) The EA acknowledges that the buggy "tracks would encourage other vehicles to follow the route." (EA at 13.) 1/ The EA notes that "OHV travel would follow routes from the source lines, and OHV use would prolong recovery of soils and vegetation on portions of the

_____

1/ The record contains several studies of impacts of off-highway vehicles (OHVs) on desert habitat. (Apr. 18, 2002, supplemental BLM documents 6-9.) While the OHV studies are not favorable to OHV use, they do not expressly analyze vibroseis vehicles. (Docs. 8-9.)

source lines." (EA at 23.) However, the EA dispenses with long-term concerns about buggy trails by stating that "routes where geophysical vehicles have driven cross-country without the use of heavy equipment for dozing or clearing vegetation can recover without substantial changes * * *," because visual effects would last for 3-5 years. (Comment Analysis at 6 (¶ 14), 13 (¶¶ 30, 31).)

Having based its FONSI in part on these statements, BLM subsequently conceded in its pleadings before the Board that this analysis regarding revegetation, redevelopment of pre-existing character and habitat, and disappearance of impacts was not accurate and did not reflect its experience with vibroseis projects. BLM appends to its Answer the Belnap Declaration (BLM Ex. D) and notes, in distinguishing visual recovery from biological recovery, that the former "should take place within 10 years. * * * BLM's experience with on-the-ground observation of the effects of other geophysical exploration in this area is consistent with this view." (BLM Answer at 34, citing Exs. D (Belnap Declaration ¶ 4) and A (McClure Declaration ¶ 13).)

Thus, by acknowledging that its experience would suggest that effects of vibroseis buggies last a decade, BLM necessarily concedes that it did not rely on that experience in responding to pleas to do so in Federal and State agency and private citizen comment letters. Commenters claimed to have witnessed the impacts of other vibroseis projects as recently as within the past year. (Letters from Bruce Berger (Jan. 19, 2002), Kent Beverly (Jan. 24, 2002), Binyons (Jan. 14, 2002), Michael Cochran (Jan. 24, 2002), Kalen Jones (Jan. 22, 2002), Doug Campbell (Jan. 14, 2002), Candee Pearson (Jan. 9, 2002).) They opined that the "crisscross devastation" from vibroseis buggies was too great, and demanded a full identification of impacts from the buggies. BLM now concedes that, based on its experience, it could readily have asserted that visual impacts would last a decade. But when called to do so, BLM ignored the evident thrust of the comment letters, and responded instead by adhering to its prior assertions regarding the shorter term of impacts as "the types of impacts that BLM has observed on previous projects." (Comment Analysis at 5 ¶ 11.) 2/ BLM further concluded that the comments presented no controversy because impacts would "be substantially unnoticeable after 3-5 years." (Comment Analysis at 13 ¶ 30.) On these facts I cannot agree with the majority that BLM took a reasonably "hard look" at impacts. 3/

_____

2/ The Declaration of Rich McClure states that his experience is consistent with BLM's contentions in its pleadings. This implies that his experience with vibroseis projects is that visual impacts last at least a decade. McClure does not state why he did not rely on that experience during the NEPA process given his intense involvement in preparation of the EA.

3/ In Oregon Natural Resources Council, 116 IBLA 355, 362 (1990) (citations omitted), we held that the question of the existence of a controversy, 40 CFR 1508.27(b)(4), is not "whether the action is subject to

Instead of identifying impacts from vibroseis projects, BLM compared old-style geophysical testing to vibroseis testing. In discussing cumulative impacts, the EA states:

> Prior to the 1980's, many geophysical operations used bulldozers for line construction. This often removed vegetation and other surface features in a straight line of sight. There was little or no restoration of topsoil or vegetation. During the 1980's, bulldozing was reduced and efforts toward surface restoration increased. Geophysical operations of the last 10 years have not left the visual impacts of the earlier projects.

(EA at 23.) This does not, however, identify the visual impacts of vibroseis buggies or verify that vibroseis projects will not have the same impacts of long-term trail development as old-style geophysical testing. BLM's declarant McClure states that the surface disturbance from the trucks would be "approximately 12 feet wide along the routes where they are driven." (BLM Ex. A (McClure Declaration ¶ 10).) Once the tracks have been created and the visual effects are evident for ten years, BLM has not distinguished their longevity from that of any other trail maintained by subsequent recreational disturbance, whatever apparatus may first have caused them.

My concern is further reinforced by BLM's adoption of mitigation measures. 4/ BLM imposed conditions for the project to achieve a reduction in impacts. Special Condition 13 states:

> Geophysical operations will be suspended when ground conditions are wet enough to cause rutting or other noticeable surface deformation and severe compaction. As a general rule, if vehicles or other project equipment create ruts in excess of 4 inches deep when traveling cross-country over wet soils, the soil shall be deemed too wet for the vehicles or equipment to be used. The Authorized Officer will determine when soils are too wet for operations to continue * * *.

---

fn. 3 (continued)
public opposition, but, rather, whether it has generated any substantial dispute as to its size, nature or effect." I would not find that the "controversy" regarding impacts has crossed the line to make the impacts so significant as to require an EIS. 40 CFR 1508.27. I would merely conclude that absent the analysis of impacts of the vibroseis project presently identified by BLM, which clearly could have been identified and fully analyzed during the EA and FONSI process, BLM has not performed its procedural obligations under NEPA.

4/ Mitigation is defined in the CEQ rules as including: avoiding impacts; minimizing impacts by limiting the degree or magnitude of the action; rectifying impacts by repair, rehabilitation, or restoration; reducing or eliminating impacts by preservation and maintenance; and compensating for impacts by substituting other resources. 40 CFR 1508.20(a) - (e).

This condition was imposed in response to Dr. Belnap's comment that "[s]oils should be DRY to at least 10 cm before the seismic activity is allowed," to avoid erosion. (USGS Letter ¶ 13.) BLM stated that Special Condition 13 would give BLM the discretion to prevent operations in muddy conditions:

> [T]he authorized officer would determine if conditions were too muddy for vehicles. The Special Conditions attached to the NOI for this project provide for the suspension of work if vehicles create 4 inch ruts * * * if conditions warrant.

(Comment Analysis at 7 ¶ 17.)

It is clear from Special Condition 13 and this exchange in the comment analysis that BLM responded to a Federal agency comment with reassurance that operations would not proceed if conditions were too muddy. BLM's response assumed an obligation to monitor soil moisture in monitoring the project.

But the record suggests that BLM did not follow through with this plan. What I find most disturbing is the tire chains on the vibroseis trucks. (Thomas Declaration ¶ 15; SUWA Letter to BLM (Feb. 14, 2002) and attached photographs.) In these documents, SUWA states that three of the four vibroseis buggies had chains on the tires, which was a procedure not anticipated or analyzed in the EA. (Thomas Declaration ¶ 15; SUWA Letter to BLM (Feb. 14, 2002).) SUWA verifies this with pictures. BLM does not explain the use of these chains. SUWA is correct that the EA addressed only impacts of tires and "tire tracks." Chains are typically put on tires when ground conditions make travel difficult. SUWA's letter to the Field Office Manager of February 14, 2002, appended pictures of the area with patchy snow, and stated that the ground was muddy. (SUWA Supplemental Pleading (Feb. 25, 2002) attaching Thomas Declaration; SUWA Letter to BLM (Feb. 14, 2002).) A reasonable inference is that WesternGeco put chains on its tires to deal with muddy conditions from melting snow.

Thus, BLM permitted the project to go forward in muddy conditions, notwithstanding that it received a comment from a Federal agency requesting it to avoid this for the project area, that BLM purported to respond to this comment by adding requirements for all soils that they not be too muddy, and that it attached a special condition that would expressly require BLM to "determine if soils are too wet for vehicles." (Comment Analysis at 7 ¶ 18.) Because BLM did not implement the project consistent with its responses to Federal agencies, a finding that the significance of impacts had been reduced or mitigated is suspect at best. 5/

5/ The majority does not explain its comment (Majority Opinion, supra, at footnote 7), that this information is "beyond the scope of the present appeal." The majority does not suggest what SUWA did wrong in raising its assertions in the context of an existing appeal. Certainly, the last

In these circumstances, I would find that SUWA has shown by objective proof that the EA and FONSI do not reflect a reasonable "hard look" at impacts and that they did not ensure a well-considered decision. BLM's attorney has conceded that the very impact the EA was designed to identify was inaccurately and, it seems, carelessly, stated. To comply with the requirement that an agency take a "hard look" at the environmental effects of a project, Kleppe v. Sierra Club, 427 U.S. at 410 n.21, it is incumbent upon BLM to accurately identify the impacts of vibroseis trucks as they travel cross-country across the public lands. SUWA has demonstrated an "error of fact" and that the EA "failed to consider a substantial environmental problem of material significance to the proposed action." Larry Thompson, 151 IBLA at 217.

This brings me to the second point of divergence from my colleagues. I agree with the majority opinion that finding that SUWA met its burden would not end our analysis given the Board's de novo review authority. But I do not agree that BLM's post-FONSI pleadings and submissions sufficiently demonstrate that impacts are not significant within the meaning of NEPA, such that a remand for further consideration would be irrelevant in any event.

BLM maintains that the Yellow Cat project area is a well-worn area that has been subjected to considerable human-caused impacts from a number of uses. Based upon the "context" in which the Yellow Cat project is to take place, BLM contends that the significance of the impacts on the project area is less than it might be on a more pristine location. (BLM Answer at 5, citing 40 CFR 1508.27(a).) 6/ BLM contends that even if the buggies create 18.3 miles of new trails, that is not a significant impact in an area subject to disparate land use practices, including permissible OHV use, and asks us to affirm this conclusion. The majority does so.

While I understand the majority's logic, my problem with reaching the same conclusion is that it presumes that nothing further can or would have been stated, based on an accurate assessment of impacts in the EA, that might have affected BLM's analysis or our view of it. I find that a conclusion that 18.3 miles of new trails in an area covered by 90 miles of roads and trails is not significant goes a step too far on this record,

_____

fn. 5 (continued)
sentence of that footnote acknowledges that parties in the "future" may properly submit such "evidence" as did SUWA here. Further, the majority does not square its suggestion that a challenge to BLM's implementation of an action on the basis of a FONSI must be distinct from review of the FONSI and EA, with its explanation of the Board's de novo review authority.

6/ In considering the "significance" of impacts, an agency must take into account the context in which the project takes place, including the setting of the proposed action and its locale, "rather than the world as a whole." 40 CFR 1508.28(a).

especially where the physical, as opposed to legal, status of 79 miles of them has not been fully described. The EA did not itself suggest such an impact would be de minimis. Rather, in response to the comment that the vibroseis buggies would create new trails which would be adopted by OHV users, BLM indicated an intent to prevent that from happening. BLM conceded that OHV use is permitted in the area, but stated:

> As long as perennial vegetation remains rooted and adjacent plants provide a seed source, native vegetation can be reestablished along cross-country geophysical routes. Signing and hand raking tracks have been successful in keeping vehicles off geophysical routes.

(Comment Analysis at 9 ¶ 21.) BLM cited to the EA's mitigation plans for soils and vegetation. Id. 7/ The planned mitigation included scarification, sign posting, and rehabilitation to avoid OHV use; the EA did not identify such increased OHV trails as an inconsequential effect. (EA at 11.)

Thus, unlike the majority, I would not exercise de novo review authority to reach a conclusion that 18.3 additional miles of roads for OHV use is not significant, within the meaning of NEPA, when, by contrast, the EA suggested BLM would attempt to prevent such trail development. Further, Federal and State agencies opposed the project on the basis of a more optimistic view of potential impacts than those BLM later acknowledged. I would not presume that commenters would have had nothing more to add had BLM acknowledged there would be a decade of visual impacts from vibroseis buggies from the outset. Nor would I prejudge impacts the EA would have then described with respect to other resources. Unlike the majority, I would not assume increased trail use cannot cross the line to "significance" merely on the basis of the fact that 80% of the area is already open to OHV use, because I must presume that there is some level of increased use that BLM would itself find to be "significant" given the many uses of the area BLM cites. My view is especially influenced by the fact that the record suggests BLM avoided timely acknowledging now-conceded impacts to the decision-maker and the public. It seems to me that this approach, if taken too far, could permit us to maneuver around NEPA rather than enforce compliance with it.

Doubling of visual impact time is a material change in the analysis of impacts. It substitutes long-term potential results of 18.3 miles of increased recreational trail development for the vegetative recovery anticipated in the EA. This change taints the EA, the record, the

_____

7/ That mitigation, in turn, relies again on the now-abandoned "1-3" year recovery for vegetation. (EA at 9.)

comments, the analysis of other impacts, and the response to comments. For the above reasons, I reluctantly dissent from the view of my colleagues. I would find that the EA as amended by BLM's post-FONSI changes does not reflect a "fully-informed and well-considered decision." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. at 519. 8/

Lisa Hemmer
Administrative Judge

8/ Without adding a lengthy discussion of the EA's alternatives, I would disagree with the majority's analysis of the issue. It appears to me that the Board, like BLM, may have substituted a 2D swath for the geophysical testing purpose identified in the EA and quoted by the majority. (Majority Opinion, supra at 167-68.) I would focus more on whether SUWA met its burden of showing that another alternative could be devised that reduced environmental impacts, as required by section 102(2)(E) of NEPA. 42 U.S.C. § 4332(2)(E) (1994).